



What is the correct way of moving a book of business? Are you complying with the requirements of the Financial Services Board (FSB)? This is the first article of three that investigates this issue, so be sure to read part two and three in February and April respectively.

Moving a book of business is a topical, but also often confusing and complicated subject in the financial services industry. The Financial Advisory and Intermediary Services department of the FSB dealt with this in some detail in a recent newsletter.

Clarifying the issue

The FSB also issued a draft Information Letter in 2015 titled Clarification of the legislative requirements relating to the transfer, cancellation and replacement of policies, and request for information prior to the cancellation of policies. It set out the approach of the FSB around the issues surrounding the moving of books.

Clients often ask the following questions:

- how do I move a book of business;
- how do I make sure this book of business cannot be moved away from me;
- please draft a contract for the moving of this book of business;
- must I get the approval of the FSB to move a book of business; and
- must I get the clients' permission to move the book of business?

In trying to answer these questions it is important to understand what is meant by the moving of a book of business. There is no legal definition for the moving of a book of business.

Defining the concept

Generally when we are requested to deal with legal issues around the moving of a book of business, the true nature of the legal transaction is as follows:

- one insurer wants to move insurance policies issued by that insurer to another insurer;
- a broker wants to move insurance policies from one insurer to another insurer while that broker remains the broker for the client;
- one broker wants to move the functions he performs with respect to insurance policies to or from another broker while the insurance policies remain in force;
- an insurer or binder holder wants to move binder functions with respect to insurance policies to or from a binder holder;
- an insurer or outsourced service provider wants to move services with respect to insurance policies to or from that outsourced service provider; or
- a combination of the abovementioned transactions.

We would therefore define what is generally referred to as the moving of a book of business as:

- a change to the contracting parties of an insurance policy; or
- a change to the contracting parties in an agreement dealing with insurance policies; or
- the replacement of one insurance policy with another where such a replacement consists of the cancellation of one insurance policy and entering into another insurance policy soon thereafter.

The right MOVES

In answering the aforementioned client questions, the different contractual relationships and the legalities around changing those contractual relationships or replacing them to give effect to the moving of a book of business should be considered.

From one insurer to another

The contractual relationship, where the contracting parties need to change in order to move insurance policies from one insurer to another insurer, is the contractual relationship between the policyholder and the current insurer.

Reference to the policyholder in this context means the party who entered into the insurance policy with the insurer and not necessarily the party receiving the benefits or paying the premiums on the insurance policy.

The Long term Insurance Act of 1998 (LTIA) and Short term Insurance Act of 1998 (STIA) provide for a process that must be followed where the two insurers agree that they want to transfer insurance policies or a book of business.

With regard to this process, an application can be made to the FSB in terms of sections 36 and 37 of the relevant Acts for such a transfer. If the FSB approves the application, the new insurer will take the place of the old insurer.

The contractual parties to the insurance policy would then have changed and the book of business is moved. This can be done without getting the specific permission of the policyholder, but the process provides for detailed disclosure to the policyholder and also an opportunity for the policyholder to object to the transfer.

In addition to the approval by the FSB, the approval of the Competition Commission might also be required for such a transfer.

Define parameters

It is also important to consider the type of policy being moved when a book of business is moved from one insurer to another.

Part VII of the Policyholder Protection Rules issued under the LTIA provides for the transfer of an assistance business group scheme, as defined, from one insurer to another insurer if the specific requirements set out in Part VII are followed.

Another option to change the contracting parties to an insurance contract from one insurer to another is to replace the insurance

policy. This would entail the cancellation of the insurance policy by the one insurer and for the other insurer to offer to enter into a new insurance policy with the policyholder.

Although most insurance policies can be cancelled by the insurer, there is no obligation on the former policyholder to enter into the new insurance policy with the new insurer. The consent of the policyholder is required to establish an insurance contract between the policyholder and the new insurer, and if the policyholder decides not to enter into the insurance contract with the new insurer, the book of business will not be moved successfully.

Unilateral termination

If a short term insurer decides to unilaterally terminate an insurance policy as part of such a replacement process, that insurer would need to comply with Rule 7.3 of the Policyholder Protection Rules issued under the STIA in terms whereof the insurer cannot unilaterally cancel a policy without giving the policyholder 30 days' notice.

It is also important to take note of the Retail Distribution Review (RDR) document published by the FSB in 2014, specifically proposal VV in terms whereof conditions will be set for the cancellation of short-term policies by insurers. In terms of the RDR Status, update document issued by the FSB in November 2015, the original insurer must remain on risk for the shorter of:

- a period of 30 days after the date on which the original insurer receives proof that the client is aware of the cancellation of the cover; or
- the period until the original insurer receives proof that the client has secured new cover.

In Part 2 of this article, which will be published in the February 2017 edition of FAnews, we will discuss the other contractual relationships and the legalities around changing those relationships or replacing them to give effect to the moving of a book of business.

Juanita Moolman
Partner
Webber Wentzel

